

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE**

Peerless Insurance Company, et al

v.

Civil No. 09-cv-121-JM

The Lennox Industries, Inc.
Warren Technology, Inc., and
USI-Ultra Services, Inc.

O R D E R

Defendant Lennox Industries, Inc. moves to dismiss or stay proceedings. Plaintiffs object.

Facts

On December 11, 2003, an office building in Bedford, New Hampshire, was destroyed by fire. Plaintiffs paid property damage claims of the owner and tenants and were subrogated to their rights against any party which caused the fire. Three potential sources of the fire were identified: a NuTone fan; two Lennox furnaces; and a Warren Technologies duct heater installed by USI-Ultra. Plaintiffs sued NuTone. See Peerless Insurance Company, et. al v. Braun-NuTone, LLC, Docket No. 1:08-cv-81-PB.

During discovery, NuTone has implied that the source of the

fire was either the furnaces or the duct heater. Four months after its expert disclosure deadline, NuTone has not disclosed any expert reports to support its deposition implications of fault. Assuming appropriately that NuTone's counsel would not controvert the liability issue without a basis, plaintiffs' counsel relied on the interrogatory implications to bring this suit. See N.H. Rules of Professional Conduct Rule 3.1.

Discussion

Whether or not NuTone is able to disclose its experts so late has not been decided. At this juncture, I must assume that Nutone has a basis for pointing its finger at Lennox. Even if NuTone were not permitted to use tardily disclosed experts, that presumed evidence could be used against defendants in this case. There simply is no basis to dismiss this case on the motion and I have already denied the request to stay.

Defendant is free to file contention interrogatories on NuTone and move for summary judgment if neither plaintiffs or NuTone have any evidence of its fault. The present motion is not an appropriate vehicle to consider dismissal.

The motion (document no. 23) is denied.

SO ORDERED.



James R. Muirhead
United States Magistrate Judge

Date: June 17, 2009

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